Supreme Court, U.S.
FILED
071515 JUN 2 - 2008
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08-1

In the

Supreme Court of the United States

CHARLES P. DANIELS, JR.
and LINDA M. DANIELS,

Petitioners,

v.

UNITED STATES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Federal Circuit Court's inflexible application of the prepayment rule to the Court of Federal Claims, a rule that the Court in *Flora v. United States*, 362 U.S. 145 (1960) held applied to the District Court, properly implements Congress's intent to grant subject matter jurisdiction to the Court of Federal Claims per 28 U.S.C. 1346(a)(1) and 1491(a)(1), so that the taxpayers herein, a husband and wife who have paid nearly $4 million toward a disputed income tax assessment that exceeds $5 million and who are blameless in the circumstance that caused their assessment to exceed the whole of their assets – namely, a third-party fraudulent manipulation of tech-sector stock prices – have no judicial forum to adjudicate their refund claim?

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Daniels v. United States, ___ Cl. Ct. ___, Dkt. No. 06-851T (Fed. Ct. Cl., 6/26/07) (Published), *aff'd*, Fed. Cir. R. 36, Dkt. No. 2007-5151 (3/10/08) (Nonprecedential).

JURISDICTION

The Judgment of the United States Court of Appeals for the Federal Circuit was filed March 10, 2008. (App. 1). Jurisdiction of the Court is invoked pursuant to 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. 1346(a)(1):

> (a) The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:
>
> > (1) any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws . . .

28 U.S.C. 1491(a)(1):

> (a)(1) The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort . . .

STATEMENT OF THE CASE

Charles Daniels is a wage earner whose skills and talents are such that in 1995 he was offered the opportunity to become the founding technology officer of a start-up telecommunications company known as Nextlink Communications, LLC. To induce Mr. Daniels to share in the risks of the venture, he was granted an equity stake in the company by means of purchase options of membership units.

The company went public in 1997 (Nextlink, Inc.; later renamed XO Communications) and the membership units were converted to shares of common stock. Mr. Daniels thus became eligible for unqualified incentive stock options. (App. 29 at par. 5).

In late 1999, a new management team was installed and Mr. Daniels' position was eliminated. Company rules required Mr. Daniels to exercise the stock options within a limited time, so on January 12,

2000 he exercised his remaining stock options and became the registered owner of 235,226 shares of Nextlink stock. (App. 30 at par. 6).

Unbeknownst to the Daniels and to the public at large, the telecommunications sector of the stock market was being fraudulently manipulated by several Wall Street investment banks; a fact only later exposed through the efforts of the SEC and the New York Attorney General. *See, e.g., SEC v. Citigroup Global Markets, etc.,* http://www.sec.gov/litigation/complaints/comp18111.htm. *See also,* D. Reingold, CONFESSIONS OF A WALL STREET ANALYST (2006) (with bibliography at 316-24).

Nextlink was trading at $70.94 a share on the day that Mr. Daniels exercised his options. At that price, the value of the options was an eye-popping $16,686,932.00. (App. 30 at par. 7).

Alas, the $70.94 stock price reflected the success of the third-party fraud on the stock market more than it did the value of the product that Mr. Daniels helped to create. During calendar year 2000, the trading value of Nextlink stock dropped precipitously. Nextlink itself became insolvent. It declared bankruptcy and by late 2001 its stock was worthless. (App. 30 at par. 7).

Nonetheless, the incentive stock options comprised a part of Mr. Daniels' wage and were taxable as income. Mr. and Mrs. Daniels claimed it as such when they filed their joint 1040 return for tax-year 2000 in or about October, 2001. By that time the

still-undetected fraud had caused the telecommunications sector of the stock market to collapse.

Congress requires the IRS to employ the 'fair market value' of a stock to calculate tax liability. 26 U.S.C. 83 & 1001(b). The IRS normally deems the trading price of a stock its fair market value. *Ibid.* Mr. and Mrs. Daniels, accordingly, reported the value of the 235,226 shares to the IRS by that standard of measure. This calculation resulted in an adjusted gross income of $14,599,852.00 and a tax assessment of $5,551,756.00. The tax liability was offset by a federal income tax withholding the Daniels paid of $3,950,169.00. (App. 30 at par. 8-9; *see also*, App. 38).

The fraud on the market was subsequently exposed and widely reported. *See*, D. Reingold, CONFESSIONS OF A WALL STREET ANALYST, *supra*, at bibliography at 316-24. Mr. and Mrs. Daniels timely amended their tax return in or about April, 2004 on the ground that due to the fraud, the $70.94 trading price the day the options were exercised was not the stock's fair market value. The Daniels' amended return claimed a corrected adjusted gross income of $925,813.00 and a tax of $107,495.00. Since the Daniels had already paid nearly $4 million in taxes, they claimed they were entitled to a refund. (App. 30-31 at par. 9-11).

Mr. and Mrs. Daniels pursued their administrative remedies within the IRS. The IRS steadfastly refused to value the 235,226 shares by any measure other than the $70.94 trading price, however, notwithstanding the by now well-reported fraud on the

market. So, on March 24, 2005, the IRS disallowed the amended tax return. (App. 31 at par. 12). On January 23, 2006, the IRS denied the Daniels' appeal of the disallowance. (App. 31 at par. 13; App. 33-34). Further, the IRS claimed Mr. and Mrs. Daniels *owed* approximately *$1.6 million* more in taxes, plus interest. (*See* App. 36-40). This was in *addition* to the nearly $4 million Mr. and Mrs. Daniels had already paid and of which our Government has had the benefit since 2001. (App. 30-32 at par. 10-13, 16).

Not surprisingly, neither Mr. Daniels' regular wage earnings nor his family's assets come close to satisfying what the IRS demands. (App. 41 at par. 4). As the court below observed, Mr. and Mrs. Daniels: "find themselves in an untenable position. . . ." (App. 3a). Mr. Daniels earned a wage – the exercised stock options – that turned out to be wholly chimerical due to a third-party fraud. The IRS, nonetheless, insists upon payment in real dollars computed on the basis of the fraudulent stock price. And so it is that an income tax that is supposed to be a percentage of an earned wage threatens to consume Mr. and Mrs. Daniels' *total* assets and more! It is truly observed that the power to tax is the power to destroy.

Mr. and Mrs. Daniels also tried to settle their tax obligation with the IRS, but their effort proved fruitless. The IRS "rejected" their Offer in Compromise. (*See, e.g.*, App. 38, at entry for May 4, 2004). *See generally*, 26 U.S.C. 7122; 26 C.F.R. 601.203(a)(2).

When the IRS disallowed the Daniels' tax refund claim, it notified them that:

> [i]f you wish to bring suit or proceedings for the recovery of any tax, penalties, or other monies for which this disallowance notice is issued, you may do so by filing suit with the United States District Court having jurisdiction, or the United States Claims Court. [App. 33].

Mr. and Mrs. Daniels filed a lawsuit for a refund in the United States District Court for the District of New Jersey based upon 28 U.S.C. 1346(a)(1). (App. 48; 44). The Government moved to dismiss per F. R. Civ. P. 12(b)(1). (App. 45 at entry 7). The motion return date was Dec. 11, 2006, on the papers per F. R. Civ. P. 78. (App. 45 at entry 7). On February 8, 2007, the District Court issued its opinion dismissing the claim for lack of subject matter jurisdiction per *Flora v. United States*, 362 U.S. 145 (1960). (App. 20-23).

Mr. and Mrs. Daniels next turned to the Court of Federal Claims ("Claims Court"), filing a Complaint on Dec. 13, 2006. (App. 25 at entry 1). The jurisdiction of the court was grounded upon a statutory basis not applicable to the District Court, 28 U.S.C. 1491(a)(1), as well as 28 U.S.C. 1346(a)(1), which was. (App. 29 at par. 4).

The Government once again moved to dismiss in lieu of answer on the basis of the *Flora* prepayment rule. (App. 26 at entry 7). Inasmuch as Mr. and Mrs. Daniels did not pay the full $5,551,756.00 in taxes,

the Government contended the Court of Federal Claims did not have subject matter jurisdiction. (App. 3).

The Court of Federal Claims granted the motion on June 26, 2007. (App. 3-19). It concluded it was bound by the precedent of the Federal Circuit and of the Claims Court, which had extended the Flora prepayment rule to the Claims Court regardless of the jurisdictional basis alleged in the Complaint. *Ibid.*

Mr. and Mrs. Daniels timely appealed to the United States Circuit Court for the Federal Circuit, per 28 U.S.C. 1295(a)(3). (App. 28 at entry 15,16). After oral argument on March 10, 2008, the Circuit Court affirmed the Judgment of the Federal Court of Claims, per Fed. Cir. R. 36. (App. 1). Mr. and Mrs. Daniels now petition the Court per Sup. Ct. R. 10(a). They submit that the Federal Circuit has extended the Court's ruling in *Flora* so far beyond its holding that Congress's manifest intent to provide a judicial forum to taxpayers who have a *bona fide* refund claim is wholly frustrated.

REASONS FOR GRANTING THE WRIT

THE SUPERVISORY POWER OF THE COURT IS REQUIRED TO ASSURE THAT *FLORA* IS NOT EMPLOYED TO NARROW THE JURISDICTIONAL REACH THAT CONGRESS INTENDED FOR THE COURT OF FEDERAL CLAIMS

The jurisdictional scheme that establishes subject matter jurisdiction over tax refund cases is intricate. Congress granted jurisdiction concurrently to the United States District Court and to the Court of Federal Claims in 28 U.S.C. 1346(a)(1). The statute says:

> [t]he district courts shall have original jurisdiction, concurrent with United States Court of Federal Claims, of:
>
> > (1) any civil action against the United States for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws . . . [*Ibid.*]

Congress also vested the Court of Federal Claims with subject matter jurisdiction in 28 U.S.C. 1491(a)(1), which says:

> [t]he United States Court of Federal claims shall have jurisdiction to render judgment upon any claim against the United States

> founded either on the Constitution, or any act of Congress or any regulation of an executive department, or upon any express or implied contract with United States, or for liquidated or unliquidated damages in cases not sounding in tort. . . [*Ibid.*]

28 U.S.C. 1346(a)(1) in its current form is traced back to 1921. *Flora v. United States*, *supra*, 362 U.S. 145, 151-153 (1960). The collection of personal income tax, itself a fairly recent development, dates back to 1913, with the passage of the Sixteenth Amendment. 28 U.S.C. 1491(a)(1), commonly known as the Tucker Act, is Congress's waiver of sovereign immunity to an Article I court. The Tucker Act, originally enacted in 1887, antedates federal income tax collection. *See generally* for history, Website, Court of Federal Claims, http://www.uscfc.uscourts.gov/sites/default/files/court_info/Court_history_brochure.pdf.

In 1960, the Supreme Court considered the following question:

> whether a *Federal District Court* has jurisdiction under 28 U.S.C. 1346(a)(1) of a suit by a taxpayer for the refund of income tax payments which did not discharge the entire amount of his assessment. [*Flora v. United States, supra*, 362 U.S. at 146 *(emphasis added)*].

The Court's answer was no. It held that: " . . . section 1346(a)(1) correctly construed, requires full payment of the assessment before an income tax refund suit

can be maintained in a *Federal District Court."* [*Id.* at 177 *(emphasis added)*].

The prepayment issue surfaced in the 1950's after Circuit Courts reached conflicting rulings about whether full tax prepayment was a condition precedent to a refund claim. *Id.* at 147; *see also,* Riordan, *Must You Pay the Full Tax Assessment before Suing in the District Court?* 8 J. Tax. 179 (March, 1958). Section 28 U.S.C. 1346(a)(1) does not state whether the taxpayer must pay the assessed tax in full before the refund suit can be filed. But it appears the assessed tax had been prepaid in the majority – but not all – refund cases. *See, e.g., Flora, supra*, 362 U.S. at 180-185. (dissent).

The comparative merits of the prepayment rule was the subject of scholarly commentary, which the Supreme Court, in turn, cited in the *Flora* decision. For example, J. Q. Riordan, Esq., a former Special Assistant to the Attorney General assigned as First Assistant to the Assistant Attorney General in charge of the Tax Division, wrote an article in the 1958 edition of the Journal of Taxation, *Must You Pay the Full Tax Assessment before Suing in the District Court?*, *supra*, 8 J. Tax. 179 (cited in *Flora, supra*, 362 U.S. 145 at footnotes 2 & 43). Mr. Riordan described the issue before the Court:

> [t]he Supreme Court has granted taxpayer's petition for writ of certiorari to review the decision of the Tenth Circuit in the *Flora* case. It will now decide whether a taxpayer must pay first and sue later, (the "old rule")

> or sue first and pay later, (the "new rule"). It is suggested that the Court should stay with the "old rule" with a gloss that will permit suits to be brought in extraordinary circumstances where the taxpayer would suffer irremediable damage if not permitted to sue. If either the old rule or the new rule is adopted without qualification, results will be unsatisfactory. [*Id.* at 179].

The Court's description of the question presented and its statement of its holding in *Flora, supra*, are revealing. 28 U.S.C. 1346(a)(1) vests subject matter jurisdiction in the District Court *and* in the Court of Claims.[1] Yet the Court never mentioned the impact of

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[1] Pursuing litigation against the Government has been said to "represent[ ] one of the last bastions of 19th-Century pleading and practice". Kirgis, *Section 1500 and the Jurisdictional Pitfalls of Federal Government Litigation*, 47 Am.U. L.R. 301, 348 (1997) to which the undersigned is in rueful accord. *See also, generally* about the often imprecise use of the term "subject matter jurisdiction" in cases involving federal claims. *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006).

28 U.S.C. 1500 deprives the Court of Federal Claims of jurisdiction of any claim "for or in respect to which the plaintiff . . . has pending in any other court . . . " This section was enacted after the Civil War when the merits of so-called cotton claims were being litigated in both the District Court and in the Court of Federal Claims. *See UNR Industries v. U.S.*, 962 F.2d 1013 (Fed. Cir. 1992), *aff'd in part sub nom., Keene Corp. v. U.S.*, 508 U.S. 200 (1993). Here, the action the Daniels' filed in the District Court per 28 U.S.C. 1346(a)(1) was dismissed per *Flora* for lack of subject matter jurisdiction on February 8, 2007. *Daniels v. United States*, DNJ Dkt. No. 06-3415 (KSH) (App. 21-23). The Government's motion per F. R. Civ. P. 12(b)(1) was returnable Dec. 11, 2006, however, and was to be decided on the

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its holding on the Court of Federal Claims; a studied omission. Moreover, in view of Mr. Riordan's article, which the Court itself cited, the Court was aware that whether the prepayment rule should be absolute *vel non* was also an issue. But the Court never reached the question. Clearly, the Court chose to take no more than the initial step in the development of this area of the law. And insofar as the jurisdiction of the District Court is concerned and as a matter of *stare decisis*, no exception to the full prepayment rule has been created in the 48 years since *Flora* was decided. *See, e.g.*, App. 21-23.

The *Flora* prepayment rule was extended to refund cases filed in the Court of Federal Claims. Indeed, the prepayment rule was extended not only to refund claims asserted under 28 U.S.C. 1346(a)(1), but to claims asserted under 28 U.S.C. 1491(a)(1) as well. *See, e.g.*, for Federal Circuit Court: *Ledford v. United States*, 297 F.3d 1378 (Fed. Cir. 2002); *Rocovich v. United States*, 933 F.2d 991 (Fed. Cir. 1991); *Shore v. United States*, 9 F.3d 1524 (Fed. Cir. 1993).

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papers per F. R. Civ. P. 78. (App. 45 at entry 7). The instant action was filed in the Claims Court on December 13, 2006.

Inasmuch as a court always has jurisdiction to determine if it has subject matter jurisdiction, *see United States v. Ruiz*, 536 U.S. 622, 626 (2002), there never was a claim pending in the District Court within the meaning of 28 U.S.C. 1500. The Government never challenged the jurisdiction of the Court of Federal Claims due to a procedural defect arising from 28 U.S.C. 1500, in any event. Had it done so, the putative defect could easily have been corrected.

See, e.g., for Court of Federal Claims: *Tonasket v. U.S.*, 218 Ct. Cl. 709 (1978) reported as an unpublished opinion at 590 F.2d 343; *Rodewald v. United States*, 231 Ct. Cl. 962 (1982) (Not reported in F. Supp.). *See generally discussion, Daniels v. United States*, ___ Cl. Ct. ___, Dkt. No. 06-851T (Fed. Cl. 06/26/07) (published), *aff'd*, R. 36 (nonprecedential) Dkt. No. 2007-5151 (3/10/08). (App. 14-16 & n.4).

The Federal Circuit has never considered Mr. Riordan's opinion that the prepayment rule leads to unsatisfactory results unless an exception is recognized for extraordinary cases. Nor has it ever analyzed whether the enforcement of the *Flora* rule in the Court of Federal Claims to bar refund claims in extraordinary cases implements Congressional intent.

It is evident from the carefully-reasoned majority and dissenting opinions in *Flora, supra,* that the Court was persuaded on balance that the potential abuse to the system of tax collection if a refund action was maintained without full payment was less tolerable than the potential abuse of power caused by an overly-rigid tax collection system that was not regularly subject to accountability by the Article III district court and a jury. The Court said:

> the Government has a substantial interest in protecting the public purse, an interest which would be substantially impaired if a taxpayer could sue in a District Court without paying his tax in full. It is instructive to note that, as of June 30, 1959, tax

> [deficiency] cases pending in the Tax Court involved $920,046,748, and refund suits in other courts involved $446,673,640. [*Flora, supra*, 362 U.S. at 175].

The Court amplified on this in a footnote, quoting a legal commentator:

> [p]ermitting refund suits after partial payment of the tax assessment would benefit many taxpayers. Such a law would be open to wide abuse, and would probably seriously impair the government's ability to collect taxes. Many taxpayers, *without legitimate grounds for contesting an assessment*, would make a token payment and sue for refund, hoping at least to reduce the amount they would ultimately have to pay. In jurisdictions where the District Court is considered to be a "taxpayer's court" most taxpayers would use that forum instead of the Tax Court. Conceivably such legislation could cause the chaotic tax collection situations which exist in some European countries, since there would be strong impetus to a policy of paying a little and trying to settle the balance. [*Id.* at 176, n. 41 *(emphasis added, citation omitted)*].

But what was just as salient to the Court's analysis in *Flora* was that the aggrieved taxpayer there had a meaningful judicial forum to contest the accuracy of the tax assessment, even if that forum was an Article I court. Thus, the Court described at length the "front-end" remedy available to: "secure a

determination of tax liability before payment of the deficiency." *Id.* at 158. *See, discussion*, 158-163. Justice Whittaker, in his dissent distilled the remedial scheme as follows:

> [t]he Government argues, with some force, that our tax legislation as a whole contemplates the Tax Court as the forum for adjudication of deficiencies, and the District Courts and the Court of Claims as the forum for adjudication of refund suits. This, in general, is true . . . [*Id.* at 392 U.S. at 193].

An "assessment" of tax liability is a term of art. 26 U.S.C. 6201 requires the Secretary of the Treasury to make the "assessments of all taxes." When the taxpayer's calculation of the tax owed is less than the assessment, a notice of deficiency is issued to the taxpayer. 26 U.S.C. 6211 & 6212. The notice triggers the right to petition the Tax Court to contest the deficiency. 26 U.S.C. 6213.

The taxpayer in *Flora* had an opportunity to challenge the deficiency in Tax Court, an opportunity he let pass in favor of filing a refund claim in the District Court. (*Flora v. United States, supra*, 362 U.S. at 147: after Commissioner levied a deficiency assessment, the petitioner paid a portion; filed for a refund and then initiated a refund lawsuit in the District Court after the claim was disallowed).

Mr. and Mrs. Daniels' situation is different. The IRS never issued a notice of deficiency to them because it was satisfied that Mr. and Mrs. Daniels owed

the amount stated on their original return – $5,551,756.00. (App. 38 at entry of 10/22/01). When Mr. and Mrs. Daniels amended their tax return after they learned of the fraud, the IRS *denied the amendation*. (App. 33-34). Thus, Mr. and Mrs. Daniels *never* had an opportunity to challenge the deficiency assessment in the Tax Court because a notice never issued. The only remedy available to Mr. and Mrs. Daniels, accordingly, is the "back end" remedy of a tax refund claim. As the IRS noted when it denied the Daniels' amended tax return:

> [i]f you wish to bring suit or proceedings for the recovery of any tax, penalties or other monies for which this disallowance notice is issued, you may do so by filing suit with the United States District Court having jurisdiction, or the United States Claims Court. (App. 33-34).

Surely, there is no more qualified authority about its labyrinthine processes than the IRS.

In *United States v. Williams*, 514 U.S. 527 (1995), the Supreme Court rejected the Government's argument that a voluntary payer of a tax had no standing to sue for refund under 28 U.S.C. 1346(a)(1). There, the tax was owed by Ms. Williams' ex-husband. The Government placed a lien on the former marital property that Ms. Williams had acquired in the divorce proceedings. She paid the tax under protest in order to close its sale. The District Court granted the Government's motion to dismiss for lack of standing and the Circuit Court reversed.

The Supreme Court affirmed. Key to the Court's analysis was that a refund claim pursuant to 28 U.S.C. 1346(a)(1) was the only recourse Ms. Williams had. The Court said: "we do not believe Congress intended to leave parties in respondent's position without a remedy." *United States v. Williams, supra,* 514 U.S. at 529.

Williams and *Flora* make clear that the Supreme Court interprets 28 U.S.C. 1346(a)(1) to require a substantive judicial forum to a blameless taxpayer who has a *bona fide* refund dispute. The Court's interpretation, moreover, wholly enforces Congress's intent to afford a meaningful judicial forum – in either the Court of Federal Claims or in the District Court – to an aggrieved taxpayer.

The procedural posture of this case – the grant of a motion to dismiss filed per RCFC 12(b)(1) – is such that the court must take as true all the factual allegations of the Complaint. It must also draw all reasonable inferences in the Daniels' favor. *Murray v. United States*, 918 F.2d 185 (Fed. Cir. 1990). Here, the Daniels are prepared to prove and a court must accept as true that the $70.94 stock trading price the day Mr. Daniels exercised his stock options was as a result of a third-party fraud on the market. (App. 31 at par. 15).

But the Daniels' claim of a fraud on the market that affected the stock trading price is much more than a procedural hypothecation. The SEC and the New York Attorney General have already obtained

relief for activity that included the fraudulent manipulation of Nextlink/XO Communications, the company Mr. Daniels helped to found. *See, e.g., SEC v. Citigroup Global Markets, etc.,* http://www.sec.gov/litigation/complaints/comp18111.htm. *See also,* D. Reingold, CONFESSIONS OF A WALL STREET ANALYST, (2006) (with bibliography at 316-24). And, in December, 2006 Congress enacted and the President signed HR 6111. Among other things, this bill provides tax relief to employees of high-tech firms whose compensation in the years 1999-2001 included participation in qualified incentive stock option plans and who were subject to AMT (*i.e.*, Alternate Minimum Tax) rules. Congress afforded tax relief because the stocks at issue were overvalued at the time the taxable event occurred. *See generally,* Wall Street Journal, 12/13/06, p. 6.

HR 6111 does not afford tax relief to Mr. and Mrs. Daniels because Mr. Daniels participated in a non-qualified stock option plan and his tax calculation was not a result of AMT rules. What is similar is the fact that Mr. Daniels was employed in the telecommunications industry – the high-tech sector of the stock market – and exercised his stock options in January, 2000. The bill's passage is a further indication, however, of the colorable nature of the Daniels' tax refund claim.

It is submitted that this case raises factors that warrant the Court's consideration of whether a tax refund claim may proceed in the Court of Federal Claims without full prepayment of the tax assessment. These factors are: (a) no "front end" opportunity to

challenge the assessment in the Tax Court because no notice of deficiency ever issued; (b) a colorable claim of fraud that affects the accuracy of the assessment; (c) a substantial payment of the assessment by the taxpayer, and (d) the taxpayer's inability to pay the balance. Inasmuch as *Flora* has cast such a broad shadow, the Court's supervision is required to address this question, about which the Court was aware when it decided *Flora*, but, appropriately, left for another day. It is respectfully submitted that day has come.

Tax refund suits in the Court of Federal Claims are a "class of proceedings [that] constitute[ ] the largest component of the court's business." 17 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE, 4101 & n. 106. It is obvious from reading the published opinions of the Court of Federal Claims that some citizens try to avoid their obligation to pay a duly-imposed tax by filing frivolous refund claims. It is therefore wholly understandable that the Federal Court would adopt the prepayment rule to deter this form of abuse. But, clearly, the Daniels are not tax abusers; after all, they have paid nearly $4 million in taxes – no nominal sum!

Unintended consequences ensue from applying an absolute prepayment rule to all judicial *fora,* moreover. The first is that aggrieved, law-abiding taxpayers are denied substantial justice – for the sake of a rule aimed at curbing tax abuse; a disquieting outcome that Congress surely did not intend. And, since the class of cases subject to any exception from the prepayment rule is fairly well-defined and wholly

distinct from the class of cases filed by tax abusers, it is possible to provide a judicial forum to the former that in no way undermines the effectiveness of the prepayment rule in deterring the latter.

Further, as applied to a class of entrepreneurs like Mr. Daniels, the prepayment rule functions as a crippling tax on innovation. It is undoubted that the link between innovation and economic prosperity has served our country well. But if taxpayers like Mr. Daniels have no meaningful forum to assert a tax refund claim, the very Americans who expand our economy to the benefit of all pay a ruinous price if the success of the venture is not immediate and sustained. After all, the company Mr. Daniels helped to found, XO, is still in business, providing jobs to others *and* tax revenue to the Government.

The Government has no real incentive to resolve exceptional cases such as Mr. and Mrs. Daniels' pre-suit if the prepayment rule is absolute in all judicial *fora*. *See also, United States v. Williams, supra*, 514 U.S. at 537-38 (Government had no incentive to agree to substitute a fund in lieu of cash payment from a non-taxpayer that the Government believed had no standing to file a tax refund action.). This case is before the Court because the Government refused to resolve this matter administratively when Mr. and Mrs. Daniels made an Offer in Compromise ("OIC"). (App. 38 at entry of 5/4/2004 – OIC "rejected"). Thus, the Government was in a position to avoid the issue raised here, but chose to be inflexibly dogmatic instead.

Perhaps this is no surprise. An Offer in Compromise is permitted in situations where, *inter alia*, the taxpayer cannot afford his putative tax liability. 26 U.S.C. 7122; 26 C.F.R. 601.203(a)(2). If the *Flora* prepayment rule applies in the Claims Court without exception, then every time the Government denies an Offer in Compromise to a taxpayer who has demonstrated an inability to pay the assessment, the Government is aware *a fortiori* that the taxpayer will be unable to obtain merits review of his refund claim.

There is a final unintended consequence of the absolute application of the prepayment rule to this case that is far more unsavory. Inasmuch as the third-party fraud on the market is now well acknowledged, if the Government is able to block substantive judicial review of its reliance upon the stock trading price to calculate Mr. and Mrs. Daniels' tax assessment, the Government will *benefit* from the fraud itself; surely an intolerable result.

CONCLUSION

. For all of these reasons, the writ of certiorari should issue to review the Judgment of the Court of Appeals for the Federal Circuit.

Respectfully submitted,

CATHERINE M. BROWN, ESQ.
P.O. Box 9058
Morristown, NJ 07963
Counsel for Petitioners

Dated: June 2, 2008

NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

2007-5151

CHARLES P. DANIELS, JR.,
and
LINDA M. DANIELS,

Plaintiffs-Appellants,

v.

UNITED STATES,

Defendant-Appellee.

Judgment

(Filed Mar. 10, 2008)

ON APPEAL from the United States Court of Federal Claims

In CASE NO(S). 06-CV-851.

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

Per Curiam: (RADER, *Circuit Judge*, CLEVENGER, *Senior Circuit Judge* and MOORE, *Circuit Judge*):

AFFIRMED. *See* Fed. Cir. R. 36.

ENTERED BY ORDER OF THE COURT

DATED MAR 10 2008

Jan Horbaly, Clerk
Jan Horbaly, Clerk

In the United States Court of Federal Claims

No. 06-851 T

CHARLES P. DANIELS, JR., AND LINDA M. DANIELS,

v.

THE UNITED STATES

JUDGMENT

(Filed Jun. 27, 2007)

Pursuant to the court's Published Memorandum Opinion and Order, filed June 26, 2007,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that the complaint is dismissed, without prejudice, for lack of subject matter jurisdiction. No costs.

Brian Bishop
Clerk of Court

June 27, 2007

By: s/Lisa L. Reyes
Deputy Clerk

NOTE: As to appeal, 60 days from this date, see RCFC 58.1, re number of copies and listing of *all plaintiffs*. Filing fee is $455.00.

In the United States Court of Federal Claims
No. 06-851T
(Filed June 26, 2007)

* * * * * * * * * * * * * * * * *		
CHARLES P. DANIELS, JR., and LINDA M. DANIELS,	*	
Plaintiffs,	*	Tax; tax refund; jurisdiction; full-payment rule.
v.	*	
THE UNITED STATES,	*	
Defendant.	*	
* * * * * * * * * * * * * * * * *		

Catherine M. Brown, Morristown, NJ, for plaintiffs.

Benjamin C. King, Jr., Washington, DC, with whom was *Assistant Attorney General Eileen J. O'Connor,* for defendant.

MEMORANDUM OPINION AND ORDER

MILLER, Judge.

The case is before the court after argument on defendant's motion to dismiss for lack of subject matter jurisdiction pursuant to RCFC 12(b)(1). Defendant contends that plaintiffs failed to pay the taxes that are the basis of their refund claim. The troubling aspect of this case is that plaintiffs find themselves in an untenable position after plaintiff

Charles P. Daniels exercised a large quantity of stock options in a technology corporation. He did not sell the stock, and the dot.com bubble burst. Consequently, he was left with a large tax obligation for the stock, assessed at its publicly traded value as of the date the options were exercised, and worthless stock to fund it.

FACTS

Charles P. Daniels, Jr., and Linda M. Daniels ("plaintiffs") are claiming a refund of taxes paid for tax year 2000. The following facts are drawn from plaintiffs' complaint and the documents attached to the parties' briefs. They are undisputed, unless otherwise indicated. Mr. Daniels was an executive and founding officer in 1995 of Nextlink Communications, LLC, a privately held telecommunications company. In 1997 the company became a publicly held corporation known as Nextlink, Inc. ("Nextlink"), and membership units were converted into shares of common corporate stock.[1] As an executive officer of Nextlink, Mr. Daniels became eligible for unqualified incentive stock options. Mr. Daniels was terminated in December of 1999 and exercised his remaining stock options on January 12, 2000. On this date Mr. Daniels became the registered owner of 235,226

[1] Nextlink changed its name to XO Communications in September 2000. All references to XO Communications are to Nextlink for continuity and clarity.

shares of Nextlink stock with a reported trading value of $70.9375 per share. During 2000, however, the stock devalued steadily, the corporation became insolvent, and by 2001 the stock was valued at zero.

Plaintiffs filed a joint tax return for the 2000 tax year during or near to October 2001, duly reporting the trading price as $70.9375 per share and using this standard of measure to calculate an adjusted gross income of $14,599,852.00 and a tax liability of $5,551,756.00. Federal income tax withheld for the year totaled $3,950,169.00.

Plaintiffs filed an amendment to their tax return on or about April 13, 2003, taking the position that $70.9375 was not the stock's fair market value on the date that the options were exercised due to fraud on the market. Plaintiffs alleged:

> The trading price is not the indicia of the fair market value per 26 U.S.C. 83 and 1001(b) because the precipitous decline which occurred during calendar year 2000 was directly caused by conditions which (a) occurred prior to January 12, 2000, (b) were not generally known in securities industry as of January 12, 2000 and c)) involved both fraudulent and criminal activity on the part of and the issuance of fraudulent financial reports by stock analysts who analyzed and reported upon the stock value of Nextlink, Inc. and other telecommunications companies.

Compl. filed Dec. 13, 2006, ¶ 15. The amended return claimed an adjusted gross income of $925,813.00, taxes to be paid totaling $107,495.00, a federal tax withholding of $4,148,443.00, and an overpayment and refund owed of $4,040,948.00. On March 24, 2005, the Internal Revenue Service (the "IRS") disallowed plaintiffs' amended tax return. The IRS denied plaintiffs' appeal of this disallowance on January 23, 2006. Upon disallowance of the amendment and denial of the appeal, the unpaid taxes owed by plaintiffs totaled $1,673,081.82, as derived from the self-reported figures on their original tax return.

The Certificate of Assessments, Payments, and Other Specified Matters, Form 4340, indicates that plaintiffs and the IRS discussed an offer in compromise on or about August 2002.[2] Almost two years later, the IRS rejected this offer on May 4, 2004.

After the IRS denied plaintiffs' appeal and rejected their offer in compromise, plaintiffs filed suit in the United States District Court for the District of New Jersey, invoking 28 U.S.C. § 1346(a)(1) (2000). *Daniels v. United States,* No. 06-3415(KSH), 2007 WL 498284 (D.N.J. Feb. 9, 2007). Plaintiffs argued that no assessment had been made against them. *Id.* at *1. However, they did not challenge the full-payment rule of *Flora v. United States,* 357 U.S. 63 (1958),

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[2] Details about the offer in compromise and other steps taken by plaintiffs to navigate the shoals of the administrative process are not a matter of record.

aff'd on reh'g, 362 U.S. 145, 177 (1957). The district court held that IRS Form 4340 was proof of a valid assessment against plaintiffs and granted defendant's motion to dismiss for lack of jurisdiction because plaintiffs had not paid the full amount of assessed tax liability required by *Flora. Daniels,* 2007 WL 498284, at *1.

Plaintiffs filed their complaint in the United States Court of Federal Claims on December 13, 2006. IRS Form 4340 reflects that, to date, plaintiffs have made tax payments totaling $3,955,025.19. They have not yet paid the $1,673,081.82 balance to the IRS representing the remainder of taxes assessed in 2000 and interest due.

DISCUSSION

1. Standard of review and jurisdiction

In considering a motion to dismiss for lack of subject matter jurisdiction pursuant to RCFC 12(b)(1), the court's "task is necessarily a limited one." *Scheuer v. Rhodes,* 416 U.S. 232, 236 (1974). "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Id.* The court therefore must accept as true any undisputed allegations of fact made by the plaintiff. *See Reynolds v. Army and Air Force Exch. Serv.,* 846 F.2d 746, 747 (Fed. Cir. 1988).

However, upon challenge to the court's subject matter jurisdiction, it is "incumbent upon [the plaintiff] to come forward with evidence establishing the court's jurisdiction. [The plaintiff] bears the burden of establishing subject matter jurisdiction by a preponderance of the evidence." *Id.* at 748; *see also McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936) (holding that "[i]f [plaintiff's] allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, he must support them by competent proof"). In its examination of jurisdiction, the court is not limited to the complaint; instead, the "court may consider relevant evidence in order to resolve the factual dispute." *Reynolds*, 846 F.2d at 747; *see also Moyer v. United States*, 190 F.3d 1314, 1318 (Fed. Cir. 1999) (holding that "[f]act-finding is proper when considering a motion to dismiss where the jurisdictional facts in the complaint . . . are challenged.").

"Because it is a sovereign, the United States may be sued only to the extent that it has consented to suit by statute, and the terms of that consent define the jurisdiction of the court to hear those suits." *Shore v. United States*, 9 F.3d 1524, 1525 (Fed. Cir. 1993) (citing *United States v. Testan*, 424 U.S. 392, 399 (1976)). The Tucker Act, 28 U.S.C. § 1491(a)(1) (2000), defines the jurisdictional reach of the Court of Federal Claims and "confers jurisdiction upon the Court of Federal Claims over the specified categories of actions brought against the United States, and . . . waives the Government's sovereign immunity for

those actions." *Fisher v. United States,* 402 F.3d 1167, 1172 (Fed. Cir. 2005) (en banc); *see also Emery Worldwide Airlines, Inc. v. United States,* 49 Fed. Cl. 211, 220, *aff'd,* 264 F.3d 1071, 1080 (Fed. Cir. 2001). The Tucker Act grants the court jurisdiction over "any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1).

Congress has manifested the requisite consent and enacted a money-mandating statute with respect to suits involving the refund of federal tax payments in 28 U.S.C. § 1346(a). In conjunction with the Tucker Act, section 1346(a)(1) establishes jurisdiction in the Court of Federal Claims over "[a]ny civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected. . . ." However, pursuant to the Supreme Court's full-payment rule, full payment of all taxes assessed is a jurisdictional prerequisite. *See Flora,* 362 U.S. at 177; *see also Shore,* 9 F.3d at 1527 ("The *Flora* full payment rule requires that taxpayers prepay the tax principal before the Court of Federal Claims will have subject matter jurisdiction over their tax refund action under § 1491."); *Rodewald v. United States,* 231 Ct. Cl. 962, 963-64 (1982) ("Plaintiff makes the specific request for monetary relief, but does not contend that he has

fully paid the taxes. Until he does so, we cannot hear his claim for a refund.")

2. The parties' positions

Defendant contends that the court lacks subject matter jurisdiction over plaintiffs' refund claims because plaintiffs have not paid the full amount of liability assessed against them. Defendant further contends that the court lacks jurisdiction to prevent the collection of taxes properly assessed by the IRS.

Plaintiffs have alleged that they are owed a significant tax refund because the assessment of their liability was based upon a fraudulent and improperly calculated stock price. Plaintiffs further imply that denying them the opportunity to petition the Government in court amounts to an abridgement of their First Amendment rights and a denial of substantive due process.

1) Jurisdiction pursuant to 28 U.S.C. § 1346(a)(1)

In response to defendant's invocation of the full-payment rule, plaintiffs do not dispute that they have not paid the amount of taxes assessed on their original income tax refund. Instead, plaintiffs seek to recharacterize *Flora* to provide jurisdiction in the instant case or, in the alternative, to establish that the Court of Federal Claims is not bound by the *Flora* precedent.

Plaintiffs' attempt to re-characterize the holding in *Flora* is two-fold. First, plaintiffs assert that the Tucker Act acts as a modern-day mechanism to allow common law actions of assumpsit against the tax collector. This is an untenable reading of the holding in *Flora*. Despite discussion of actions for assumpsit, the Court was "not satisfied that the suit against the collector was identical to the common-law action of assumpsit for money had and received," 362 U.S. at 153, and the Court's decision in *Cheatham v. United States*, 92 U.S. 85 (1876), "prevent[ed] [the Court] from accepting the analogy between the statutory action against the Collector and the common-law count." *Flora*, 362 U.S. at 153. Section 1346(a)(1)'s historical ties to the common law action of assumpsit do not provide jurisdiction for the court to hear plaintiffs' refund claims.

Plaintiffs additionally argue "what was just as salient to the Court's analysis *in Flora* was that the aggrieved taxpayer there had a meaningful judicial forum, even if that forum was an Article I court." Pls.' Br. filed Apr. 25, 2007, at 8. Thus, "*Williams* and *Flora* make clear that [the] Supreme Court interprets 28 U.S.C. 1346(a)(1) to require a substantive judicial forum to a taxpayer who has a *bona fide* refund dispute." *Id.* at 1; *see United States v. Williams*, 514 U.S. 527, 529 (1995) ("[W]e do not believe Congress intended to leave parties in respondent's position without a remedy.").

Although plaintiffs correctly assert that the Supreme Court has emphasized the necessity of

providing taxpayers a forum in which to bring their grievances, this acknowledged objective does not provide the court with jurisdiction to hear plaintiffs' claim. Section 1346(a)(1) and the jurisdictional provisions governing the United States Tax Court provide adequate fora for taxpayers and form "a system in which there is one tribunal for prepayment litigation and another for post-payment litigation, with no room contemplated for a hybrid. . . ." *Flora*, 362 U.S. at 163. Thus, if a taxpayer is barred from bringing, or does not wish to bring, suit in Tax Court, section 1346(a)(1) provides an alternative forum for a tax refund suit in either federal district court or the Court of Federal Claims.[3] Specific limitations govern

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[3] Plaintiffs may bring suit in Tax Court for two types of relief:

1) Plaintiffs may file suit within 90 days of an IRS-issued deficiency notice. *See* 26 I.R.C. § 6213(a) (2000). A deficiency notice is issued when tax imposed by the IRS exceeds "the sum of . . . the amount shown as the tax by the taxpayer upon his return." I.R.C. § 6211 (2000).

2) Plaintiffs may bring a collection due process action, pursuant to I.R.C. § 6320 (2000), and 26 I.R.C. § 6330 (2000). Section 6320 requires the IRS to notify a taxpayer of his right to a hearing within five business days of filing a notice of federal tax lien. Section 6330 requires the IRS to notify a taxpayer of his right to a hearing within thirty days prior to levy. In such collection due process actions,

> [t]he person may also raise at the hearing challenges to the existence or amount of the underlying tax liability for any tax period if the person did not receive any

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this provision, as characteristic of most jurisdictional grants. "Section 1346(a)(1) is a postdeprivation remedy, available only if the taxpayer has paid the Government in full." Williams, 514 U.S. at 538. Even though *Williams* emphasized the importance of providing a taxpayer an adequate forum in which to seek remedy, to secure such a forum a taxpayer must pay the full amount of tax assessed regardless of extraordinary circumstances and concomitant hardship.

Plaintiffs further argue that the Supreme Court did not extend the *Flora* full-payment rule to the United States Court of Claims, nor to its successor, the Court of Federal Claims, asserting that the court should reconsider or depart from the application of *Flora*. *See* Pls.' Br. filed Apr. 25, 2007, at 16 ("As for

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> statutory notice of deficiency for such tax liability or did not otherwise have an opportunity to dispute such tax liability.

I.R.C. § 6330(c)(2)(B); *see also* I.R.C. § 6620(c)) (applying particular provisions of section 6330, including section 6330(c)(2)(B), to actions pursuant to section 6620).

In the instant case, the IRS did not impose additional liabilities upon plaintiffs, and the tax assessed was the amount reported in plaintiffs' tax return. Because, by definition, no deficiency existed, although plaintiffs had not paid the full amount of assessed liability as reported on their 2000 tax return, no deficiency notice issued, and plaintiffs were unable to bring suit in response to a notice of deficiency. Plaintiffs maybe entitled to file a collection due process action pursuant to I.R.C. § 6330 or § 6320 after mandated notification of government lien or levy. *See infra* note 4.

the full payment rule, the Supreme Court never applied that rule to the Court of Federal Claims; the Court of Federal Claims did.").

The Court of Claims, predecessor to the Court of Federal Claims and genesis of precedent binding on the Court of Federal Claims, adopted the full-payment rule of *Flora* in *Tonkasket v. United States,* 218 Ct. Cl. 709 (1978).[4] Plaintiffs in *Tonasket* sought

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[4] *Tonasket* was reported at 590 F.2d 343 as one of a table of "Decisions by Order Without Published Opinions" and published in the Court of Claims Reporter at 218 Ct. Cl. 709. The version of *Tonasket* found at www.westlaw.com incorrectly lists this order under the following header: "NOTICE: THIS IS AN UNPUBLISHED OPINION. (The Court's decision is referenced in a 'Table of Decisions Without Reported Opinions' appearing in the Federal Reporter. Use FI FCL CT Rule 52.1 for rules regarding the citation of unpublished opinions.)" Contrary to this designation, the United States Court of Appeals for the Federal Circuit has cited to and relied upon *Tonasket* as binding precedent. *See Shore,* 9 F.3d at 1526 ("The full payment requirement of Section 1346(a)(1) and *Flora* applies equally to tax refund suits brought in the Court of Federal Claims under Section 1491." (citing *Tonasket,* 218 Ct. Cl. at 711-712; *Katz v. United States,* 22 Cl. Ct. 714, 714-15 (1991)).

An unbroken line of authority requiring full-payment as a jurisdictional prerequisite has issued from the Federal Circuit. *See Ledford v. United States,* 297 F.3d 1378 (Fed. Cir. 2002) (dismissing plaintiff's complaint because plaintiff had not yet paid assessed tax for which he sought a refund); *Shore,* 9 F.3d at 1526 ("Where the principal tax deficiency has not been paid in full, such tax refund claims are dismissed, regardless of any interest or penalty payments."); *Rocovich v. United States,* 933 F.2d 991, 993 (Fed. Cir. 1991) ("The full payment rule of *Flora* has long been applied by the Claims Court, and before that by the Court of Claims, to dismiss tax refund suits against the

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to establish that *Flora* did not apply to refund suits in the Court of Claims. The Court of Claims rejected this argument, holding that the court could not "construe *Flora* to preclude part-payment tax suits in district courts, but allow[ ] such part-payment actions [in the Court of Claims]." *Tonasket,* 218 Ct. Cl. at 711.

> Although the precise holding of *Flora* requires full payment before tax suits in district courts, the *ratio decidendi* of that ruling – that full payment before suit is necessary to preserve the harmony of a carefully structured tax litigation system . . . must extend to require full payment before suit in the Court of Claims.

United States when the assessment has not been paid in full prior to commencement of the action.").

This court "is bound to accept as binding precedent all published decisions of the former Court of Claims, 'unless and until modified by decisions of the United States Court of Appeals for the Federal Circuit or the United States Supreme Court.'" *West Seattle Gen. Hosp., Inc. v. United States,* 1 Cl. Ct. 745, 746 (1983) (quoting General Order No. 1 of the United States Claims Court). *But see S. Corp. v. United States,* 690 F.2d 1368, 1369 (Fed. Cir. 1982) ("We hold that the holdings of our predecessor courts, the United States Court of Claims and the United States Court of Customs and Patent Appeals, announced by those courts before the close of business September 30, 1982, shall be binding as precedent in this court."). The Federal Circuit has extended this rule to holdings, such as *Tonasket,* that are embodied in orders published in the Court of Claims Reports, although not in West Group publications.

Id. at 712. The Court of Claims elaborated on this reasoning and applied the *Flora* full-payment rule in *Rodewald*:

> In *Flora v. United States,* 362 U. S. 145 (1960), the Supreme Court, after careful consideration and reconsideration, interpreted 28 U.S.C. § 1346(a)(1) as requiring a taxpayer to pay fully the taxes assessed for a given year before a federal district court may entertain a refund suit. We have found the rationale and holding of that decision equally applicable to suits here.

231 Ct. Cl. at 963 (citing *Tonasket,* 218 Ct. Cl. at 711-12, and *Green v. United States,* 220 Ct. Cl. 712, 713 (1979)).

Under *Flora* and section 1346(a)(1), plaintiffs are afforded the opportunity to bring a tax refund suit, provided that they meet the jurisdictional prerequisite of full payment of assessed tax liabilities. *See Flora,* 362 U.S. at 177. The *Flora* full-payment rule, properly interpreted and properly applied to the Court of Federal Claims, prohibits exercise of jurisdiction over plaintiffs' claims pursuant to section 1346(a)(1) because they have not paid their assessed tax liability in full.

2) Plaintiffs' constitutional claims

Plaintiffs' implied constitutional claims do not come within the jurisdiction of the Court of Federal Claims. Even if plaintiffs imply claims against the

Government for violations of the United States Constitution, the Court of Federal Claims may hear such claims only if the constitutional provisions under which the claims are brought are "money-mandating." *Fisher,* 402 F.3d at 1172; *see also Khan v. United States,* 201 F.3d 1375, 1377 (Fed. Cir. 2000) ("[T]o invoke jurisdiction under the Tucker Act, a plaintiff must identify a contractual relationship, constitutional provision, statute, or regulation that provides a substantive right to money damages."). While plaintiffs' allegations may implicate the First Amendment right to petition the Government for redress of grievances and the Due Process Clause of the Fifth Amendment, these provisions do not mandate payment of money by the Government.

"[T]he first amendment, standing alone, cannot be . . . interpreted to command the payment of money." *United States v. Connolly,* 716 F.2d 882, 887 (Fed. Cir. 1983) (en banc) (adhering to Court of Claims decision in *Featheringill v. United States,* 217 Ct. Cl. 24, 32-33 (1978)); *see also Hamlet v. United States,* 63 F.3d 1097, 1107 (Fed. Cir. 1995); *Rosano v. United States,* 9 Cl. Ct. 137, 142 (1985), *aff'd,* 800 F.2d 1126 (Fed. Cir. 1986) (per curiam). "[T]he literal terms of the first amendment neither explicitly nor implicitly obligate the federal government to pay damages." *Connolly,* 716 F.2d at 887. Therefore, plaintiffs' First Amendment claim cannot serve as the basis for jurisdiction for a suit in the Court of Federal Claims.

A claim based upon the Fifth Amendment alone is also insufficient to invoke the jurisdiction of the Court of Federal Claims. *See LeBlanc v. United States,* 50 F.3d 1025, 1028 (Fed. Cir. 1995) (holding that claims under Due Process Clauses of Fifth and Fourteenth Amendments, Equal Protection Clause of Fourteenth Amendments, and doctrine of Separation of Powers do not invoke jurisdiction of Court of Federal Claims); *see also Crocker v. United States,* 125 F.3d 1475, 1476-77 (Fed. Cir. 1997) (holding that Court of Federal Claims lacks jurisdiction to hear due process claims).

Because plaintiffs' complaint does not implicate a money-mandating provision of the Constitution, the court lacks jurisdiction over plaintiffs' constitutional claims.

CONCLUSION

Accordingly, based on the foregoing, the Clerk of the Court shall dismiss the complaint pursuant to RCFC 12(b)(1) without prejudice for lack of subject matter jurisdiction.[5]

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[5] Pursuant to 28 U.S.C. § 1631 (2000), "the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed." See Nat'l Ctr. for Mfg. Sciences v. United States, 114 F.3d 196 (Fed. Cir. 1997) ("The federal transfer statute, 28 U.S.C. § 1631, provides that a court may transfer an action to another court if the transferor

(Continued on following page)

IT IS SO ORDERED.

No costs.

s/ Christine O.C. Miller
Christine Odell Cook Miller
Judge

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court lacks jurisdiction to hear the action and the transferee court would have jurisdiction.").

The court must consider, prior to dismissal, whether transfer is appropriate in each case. *See Fisherman's Harvest, Inc. v. PBS & J,* 2007 WL 1774922, at *2 (Fed. Cir. June 21, 2007); *Tex. Peanut Farmers v. United States,* 409 F.3d 1370, 1374-75 (Fed. Cir. 2005). During argument plaintiffs did not indicate a willingness to investigate or pursue a transfer to the Tax Court because no notice of deficiency issued. *See supra* note 3.

NOT FOR PUBLICATION

CHARLES P. DANIELS and, LINDA M. DANIELS, Plaintiffs, v. UNITED STATES OF AMERICA Defendant	Case No. 06-3415(KSH) **ORDER** (Filed Feb. 9, 2007)

THIS matter having come before the Court on defendant's motion to dismiss; .the Court having considered the parties' submissions; and for the reasons stated in the Opinion filed herewith,

IT IS on this 8th day of February, 2007,

ORDERED that defendants' motion to dismiss reflected on the docket as entry #7 is **granted.**

/s/ Katharine S. Hayden
KATHARINE S. HAYDEN
United States District Judge

NOT FOR PUBLICATION

CHARLES P. DANIELS and, LINDA M. DANIELS, Plaintiffs, v. UNITED STATES OF AMERICA Defendant	Case No. 06-3415(KSH) **OPINION** (Filed Feb. 9, 2007)

KATHARINE S. HAYDEN U.S.D.J

I. INTRODUCTION

The United States has brought a motion to dismiss for lack of jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1), which is **granted** for the following reasons.

II. STANDARD

When subject matter jurisdiction of the Court is challenged pursuant to Federal Rule of Civil Procedure 12(b)(1), the plaintiff has the burden of proving that jurisdiction exists. *Mortensen v. First Federal Sav. and Loan Ass'n,* 549 F.2d 884, 891 (3d Cir. 1977). "[N]o presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims." *Id.* In addition, "the Court may look to documents outside the pleadings in order to assess jurisdictional facts sufficient to assure the Court of the propriety of its

adjudication of a particular claim." *Christie v. Public Service Elec. and Gas Co.*, 2006 WL 462588, *6 (D.N.J., 2006).

III. DISCUSSION

Charles Daniels and Linda Daniels ("plaintiffs") filed this action on July 26, 2006, seeking a refund for income taxes they paid for the 2000 tax year. (Compl.) The United States asserts that the Court lacks jurisdiction to hear this tax refund action because the taxpayers have not paid their taxes in full. (United States's Brief in Support of Motion to Dismiss 2.)

A district court does not have jurisdiction over a taxpayer refund action unless the taxpayer has paid the entire amount of the assessment made against him or her. *Flora v. United States,* 362 U.S. 145 (1960); *Miscovsky v. United States,* 414 F.2d 954 (3d. Cir. 1969). Here, the plaintiffs are not challenging the holding of *Flora.* Instead, they argue that the Court has jurisdiction because the government has not proved that an assessment was made against them. (Plaintiffs' Brief in Opposition to the Motion to Dismiss 7.)

The United States has included in its submissions a certified copy of a transcript from the IRS that shows an assessment was made against the plaintiffs on November 26, 2001. (Ex. A to the Blaskopf Decl.) A certified transcript from the IRS is sufficient evidence that an assessment has been made. *Essex Ins. Co. v. McManus,* 299 F.Supp.2d 939, 942 (E.D.Mo. 2003).

The transcript presented here also establishes that the plaintiffs have not paid the full amount of the assessment made against them. (Ex. A to the Blaskopf Decl.) For this reason, the Court lacks jurisdiction to hear this taxpayer refund action.

IV. CONCLUSION

Plaintiffs have sought relief without paying the full amount of the taxes assessed, a jurisdictional prerequisite. As such, the Court does not have jurisdiction and will **grant** the motion to dismiss. An appropriate order will be entered.

/s/ Katharine S. Hayden
KATHARINE S. HAYDEN
United States District Judge

APPEAL, CLOSED, ECF

US Court of Federal Claims
United States Court of Federal Claims (COFC)
CIVIL DOCKET FOR CASE #: 1:06-cv-00851-CCM

DANIELS et al v. USA
Assigned to:
Judge Christine O.C. Miller
Demand: $4,041,000
Case in other court: 07-05151
Cause: 28:1491 Tucker Act

Date Filed: 12/13/2006
Date Terminated:
06/27/2007
Jury Demand: None
Nature of Suit:
212 Tax-Income,
Individual
Jurisdiction:
U.S. Government
Defendant

Plaintiff

CHARLES P. DANIELS, JR.
and

represented by
Catherine M. Brown
Catherine M. Brown,
LLC
P.O. Box 9058
60 Washington Street
Ground Floor
Morristown, NJ 07963
(973) 984-9300
Fax: (973) 984-6590
Email:
cmb.certcivatty@
gmail.com
LEAD ATTORNEY
ATTORNEY TO BE
NOTICED

Plaintiff **LINDA M. DANIELS**	represented by **Catherine M. Brown** (See above for address) *LEAD ATTORNEY* *ATTORNEY TO BE NOTICED*
V.	
Defendant **USA**	represented by **Benjamin C. King, Jr.** U. S. Department of Justice Tax Division, Claims Court Section P.O. Box 26 Ben Franklin Station Washington, DC 20044-0026 Email: benjamin.c.king@usdoj.gov *LEAD ATTORNEY* *ATTORNEY TO BE NOTICED*

Date Filed	#	Docket Text
12/13/2006	1	COMPLAINT against USA (TRE) (Filing fee $250, Receipt number 065827), filed by CHARLES P. DANIELS, JR, LINDA M. DANIELS. Answer due by 2/12/2007.(lg1,) (Entered: 12/14/2006)
12/13/2006	2	NOTICE of Assignment to Judge Christine O.C. Miller. (lg1,) (Entered: 12/14/2006)

12/13/2006	3	NOTICE of Designation of Electronic Case. (lg1,) (Entered: 12/14/2006)
02/12/2007	4	MOTION for Extension of Time until February 22, 2007 to Answer, filed by USA. Response due by 3/1/2007. (King, Benjamin) (Entered: 02/12/2007)
02/12/2007	5	NOTICE of Appearance by Benjamin C. King, Jr for USA. (King, Benjamin) (Entered: 02/12/2007)
02/13/2007	6	ORDER granting 4 Motion for Extension of Time. Defendant shall file its Answer on or by February 22, 2007. Signed by Judge Christine O.C. Miller.(jpk) (Entered: 02/13/2007)
02/22/2007	7	MOTION to Dismiss pursuant to Rule 12(b)(1), filed by USA. Response due by 3/26/2007. (Attachments: # 1) (King, Benjamin) (Entered: 02/22/2007)
03/14/2007	8	MOTION for Extension of Time until 4/25/2007 to to [sic] respond to Government's Motion to Dismiss, filed by CHARLES P. DANIELS, JR. Response due by 4/2/2007. (Brown, Catherine) (Entered: 03/14/2007)
03/15/2007		ORDER granting 8 Plaintiffs' Unopposed Motion for Extension of Time until April 25, 2007, to file their response to defendant's dispositive motion. Signed by Judge

		Christine O.C. Miller. (smg) (Entered: 03/15/2007)
03/16/2007		Set/Reset Deadlines: Response due by 4/25/2007. (lg1,) (Entered: 03/16/2007)
04/25/2007	9	RESPONSE to 7 MOTION to Dismiss pursuant to Rule 12(b)(1), filed by CHARLES P. DANIELS, JR. Reply due by 5/7/2007. (Attachments: # 1 Affidavit of Charles Daniels with Exhibit A# 2 Exhibit B) (Brown, Catherine) (Entered: 04/25/2007)
04/26/2007	10	ORDER Setting Hearing on Motion 7 MOTION to Dismiss pursuant to Rule 12(b)(1): Oral Argument set for Wednesday, June 6, 2007 at 02:00 PM in National Courts Building before Judge Christine O.C. Miller. Signed by Judge Christine O.C. Miller, (smg) Modified on 5/29/2007 to edit day of argument. (Samler, Debbie). (Entered: 04/26/2007)
05/09/2007	11	REPLY to Response to Motion re 8 MOTION for Extension of Time until 4/25/2007 to to [sic] respond to Government's Motion to Dismiss, filed by USA. (King, Benjamin) (Entered: 05/09/2007)
06/05/2007		Set/Reset Transcript Deadlines: Transcript due by 7/6/2007. (vp1,) (Entered: 06/05/2007)

06/26/2007	12	Order/Opinion granting 7 Motion to Dismiss – Rule 12(b)(1). This Opinion is PUBLISHED. The Clerk of the Court is directed to enter judgment. Signed by Judge Christine O.C. Miller. (smg) (Entered: 06/26/2007)
06/27/2007	13	JUDGMENT entered, pursuant to Rule 58, that the complaint is dismissed, without prejudice, for lack of subject matter jurisdiction. No costs. (lld) (Entered: 06/27/2007)
07/06/2007	14	TRANSCRIPT of Proceedings (pages 1-58) held on June 6, 2007 before Judge Christine O.C. Miller. (dw1) (Entered: 07/10/2007)
07/31/2007	15	NOTICE OF APPEAL as to 13 Judgment filed by CHARLES P. DANIELS, JR and LINDA M. DANIELS. Filing fee $455, receipt number 066915. Copies to Judge Christine O.C. Miller, opposing party and CAFC. (dw1) (Entered: 08/01/2007)
08/07/2007	16	CAFC Case Number 07-5151 for 15 Notice of Appeal filed by CHARLES P. DANIELS, JR., LINDA M. DANIELS. (hw1,) (Entered: 08/16/2007)

IN THE UNITED STATES
COURT OF FEDERAL CLAIMS

CHARLES P. DANIELS, JR. and LINDA M. DANIELS, Plaintiffs, vs. THE UNITED STATES OF AMERICA, Defendant.	Civil No.: 06-851T COMPLAINT (Received Dec. 13, 2006)

PLAINTIFFS' ORIGINAL COMPLAINT

1. Plaintiffs Charles P. Daniels, Jr., and Linda M. Daniels, husband and wife, are citizens of the United States who live at 230 Springfield Ave., Rutherford, N.J. 07070.

2. The defendant is the United States of America.

3. This suit arises under Section 83, 1001(b), *inter alia,* of the Internal Revenue Code (26 U.S.C.) and the laws of the United States for the refund of income taxes collected from the plaintiffs.

4. Jurisdiction is conferred upon the Court by 28 U.S.C. 1346(a)(1) and 1491(a).

COUNT I
(Tax Year 2000)

5. Charles Daniels was an executive officer of Nextlink Communications, LLC, a telecommunications company, at the time of its founding in 1995. He was granted various purchase options with respect to membership units. The

privately-held entity was converted into a publicly held corporation known as Nextlink, Inc. in 1997 and its membership units were converted to shares of common stock.

6. Mr. Daniels was terminated in December, 1999 and, in accordance with company rules concerning the exercise of unqualified incentive stock options, exercised his remaining stock options for 235,226 shares on January 12, 2000, and became the registered owner of the shares, which the plaintiffs continue to own.

7. On January 12, 2000, the reported trading value of a share of Nextlink, Inc. stock was equal to $70.9375 dollars. During calendar year 2000 trading value of Nextlink stock experienced a precipitous devaluation and, with the eventual insolvency of Nextlink Inc. during the calendar year 2001, the stock was revalued to a zero value.

8. The initial return stated an adjusted gross income of $14,599,852.00; a tax of $5,551,756.00, and a federal income tax withholding of $3,950,169.00.

9. Federal income tax withheld for tax year 2000 was $3,950,169.00, when the actual sum that should have been withheld is $198,274.00.

10. The plaintiffs filed, upon authorized extension, a joint Federal income tax return (Form 1040) for calendar year 2000. They timely amended the return (Form 1040X) on or about April 13, 2003, paid the taxes reported due on the amended return and claimed a refund. The taxpayer identification numbers as reflected on Form 1050X are

XXX-XX-5792 (Charles P. Daniels, Jr.) and XXX-XX-8315 (Linda M. Daniels).

11. The amended return claimed a corrected adjusted gross income of $925,813.00; a tax of $107,495.00; a Federal income tax withholding of $4,148,443.00; and an overpayment of $4,040,948.00 to be refunded.

12. On March 24, 2005, the Internal Revenue Service, Department of Treasury, disallowed the amended tax return.

13. The plaintiffs timely filed an appeal, which was denied by the Internal Revenue Service by notice of disallowance issued by certified mail on January 23, 2006, on the ground that the plaintiffs did not show they were entitled to the refund. A copy of the notice of disallowance is attached hereto as Exhibit A.

14. In September, 2000, Nextlink, Inc. renamed itself XO Communications.

15. The trading price is not the indicia of the fair market value per 26 U.S.C. 83 and 1001(b) because the precipitous decline which occurred during calendar year 2000 was directly caused by conditions which (a) occurred prior to January 12, 2000, (b) were not generally known in securities industry as of January 12, 2000 and (c) involved both fraudulent and criminal activity on the part of and the issuance of fraudulent financial reports by stock analysts who analyzed and reported upon the stock value of Nextlink, Inc. and other telecommunications companies.

16. In all dealings with the IRS the plaintiffs cooperated fully and showed adequate recordkeeping and evidence in support of their position.

17. Federal income tax withholdings for tax year 2000 were erroneously and illegally assessed and collected.

18. The plaintiffs overpaid taxes for tax year 2000; they are the sole owners of the claim on which the suit is based and have made no assignment of the claim.

19. The Complaint herein is timely. It is been filed within two years from the date of the denial of the refund and the plaintiffs did not file a Waiver of Statutory Notification of Claim Disallowance, Form 2297.

WHEREFORE, plaintiffs Charles P. and Linda M. Daniels pray for judgment against the defendant, the United States of America, in the amount of $4,040,948, plus interest, attorney's fees, and costs as allowed by law, and for such other and further relief as the court may deem appropriate and just.

/s/ Catherine M. Brown
Catherine M. Brown, Esq.
Attorney for Plaintiffs

Catherine M. Brown, L.L.C.
P.O. Box 9058
60 Washington St, Ground Floor
Morristown, NJ 07963
973-984-9300
973-984-6590 (facsimile)

EXHIBIT A

Internal Revenue Service	**Department of the Treasury**
Date: JAN 23 2006	Taxpayer Identification Number: XXX-XX-XXXX
	Kind of Tax: Income
	Tax Period(s) Ended December 31, 2000
	Amount of Claim: $4,040,948.00
Charles & Linda Daniels	Date Claim Received: April 19, 2004
xxxxx xxxxx xxxxx	Person to Contact: Mr. Mahoney
xxxxx xx xxxxx	Contact Telephone Number: 215-861-3840
	Employee Identification Number: xx-xxxxx
	CERTIFIED MAIL

Dear Charles & Linda Daniels:

We are sorry, but we cannot allow your claim for an adjustment to your tax, for the reasons stated below. This letter is your legal notice that we have fully disallowed your claim.

If you wish to bring suit or proceedings for the recovery of any tax, penalties, or other moneys for which this disallowance notice is issued, you may do so by filing suit with the United States District Court having jurisdiction, or the United States Claims

Court. The law permits you to do this within 2 years from the mailing date of this letter. However, if you signed a *Waiver of Statutory Notification of Claim Disallowance*, Form 2297, the period for bringing suit began to run on the date you filed the waiver.

We have enclosed Publication 5, *Your Appeal Rights and How to Prepare a Protest If You Don't Agree*, and Publication 594, *The IRS Collection Process*, if additional tax is due.

If you have any questions, please contact the person whose name and telephone number are shown in the heading of this letter. Thank you for your cooperation.

Sincerely yours,

/s/ John Mahoney
John Mahoney
Revenue Agent

Enclosures:
Publication 5
☒ Publication 594

Reasons for disallowance:

You did *not* show that you were entitled to this refund.

IN THE UNITED STATES COURT
OF FEDERAL CLAIMS

No. 06-851 T

(Judge Christine O.C. Miller)

CHARLES P. DANIELS, JR.
and LINDA M. DANIELS,

Plaintiffs

v.

UNITED STATES,

Defendant

MOTION TO DISMISS

(Filed Feb. 22, 2007)

Pursuant to RCFC 12(b)(1), the United States, moves to dismiss this case without prejudice for lack of subject matter jurisdiction, because plaintiffs have not fully paid their assessed taxes for the year 2000. In support of this motion, defendant relies on an IRS Certificate of Assessment and Payments (Form 4340), dated December 6, 2006, for plaintiffs' 2000 tax year, which is attached as Exhibit A.

Plaintiffs filed suit on December 13, 2006, to obtain an income tax refund of $4,040,948.00 for their 2000 tax year. (Comp. § 18, at 4.) The Certificate of Assessments and Payments for that year shows that

the IRS assessed $5,551,756 of income tax – the amount

* * *

United States [SEAL] of America

Department of the Treasury
Internal Revenue Service

Date: December 6, 2006

CERTIFICATE OF OFFICIAL RECORD

I certify that the annexed: Form 4340 Certificate of Assessments, and Payments, consisting of 5 page(s), of taxpayer(s) named herein in respect to the taxes specified, is a true and complete transcript for the period(s) stated, and all assessments, credits, and refunds relating thereto as disclosed by the records of this office as of the date of this certification are shown therein. Charles & Linda Daniels, 230 Springfield Ave., Rutherford, NJ 07070 for Tax Period(s) 200012 Form 1040.

under the custody of this office

IN WITNESS WHEREOF, I have hereto set my hand, and caused the seal of this office to be affixed, on the day and year first above written.

By direction of the Secretary of the Treasury:

/s/ Paul L. Czarnecki
PAUL L. CZARNECKI
ACCOUNTING CONTROL/
SERVICES OPERATION
MANAGER
PHILADELPHIA SUBMIS-
SION PROCESSING CENTER

CERTIFICATE OF ASSESSMENTS, PAYMENTS, AND OTHER SPECIFIED MATTERS

CHARLES P & LINDA M DANIELS EIN/SSN: XXX-XX-XXXX
XXX-XX-XXXX

TYPE OF TAX: U.S. INDIVIDUAL INCOME TAX RETURN
FORM: 1040 TAX PERIOD: DEC 2000

DATE	EXPLANATION OF TRANSACTION	ASSESSMENT, OTHER DEBITS (REVERSAL)	PAYMENT, CREDIT (REVERSAL)	ASSESSMENT DATE (23C, RAC 006)
	RETURN PREPARER TIN: 137407666			
	ADJUSTED GROSS INCOME 14,599,852.00			
	TAXABLE INCOME 14,088,342.00			
10-22-2001	RETURN FILED & TAX ASSESSED 18221-302-45411-1 200146	$5,551,756.00		11-26-2001
04-15-2001	WITHHOLDING & EXCESS FICA		3,950,169.00	
04-15-2001	EXTENSION OF TIME TO FILE EXT. DATE 08-15-2001			
04-15-2001	EXTENSION OF TIME TO FILE EXT. DATE 10-15-2001			
	INTEREST ASSESSED 20014608	74,100.16		11-26-2001
12-03-2001	IMMEDIATE TAX RELIEF CREDIT		600.00	
	ADDITIONAL TAX ASSESSED 18254-999-05099-1 20014708	0.00		12-03-2001
	INTEREST ASSESSED 20014708	2,250.85		12-03-2001
02-21-2002	RECEIVED POA/TIA			
08-29-2002	OFFER IN COMPROMISE PENDING			
08-29-2002	OFFER IN COMPROMISE PENDING			
12-08-2003	OVERPAID CREDIT APPLIED 1040 200212		440.19	
05-04-2004	OFFER IN COMPROMISE REJECTED			

05-31-2004	MODULE IN FEDERAL PAYMENT LEVY PROGRAM			
06-07-2004	MODULE REVERSED OUT OF FEDERAL PAYMENT LEVY PROGRAM			
	ADDITIONAL TAX ASSESSED BY EXAMINATION AUDIT, CLOSED TO APPEALS PRIOR TO 90 DAY LETTER 28247-642-10017-5 20053608	0.00		09-19-2005
04-15-2005	OVERPAID CREDIT APPLIED 1040 200412		3,816.00	
	ADDITIONAL TAX ASSESSED BY EXAMINATION AUDIT REVIEW ASED 20060123 17247-466-00063-6 20061108	0.00		03-27-2006
03-27-2006	RENUMBERED RETURN 17247-466-00063-6			
07-24-2006	MODULE IN FEDERAL PAYMENT LEVY PROGRAM			
07-01-2006	LEGAL SUIT PENDING			
10-23-2006	MODULE REVERSED OUT OF FEDERAL PAYMENT LEVY PROGRAM			
11-26-2001	Statutory Notice of Balance Due			
12-03-2001	Statutory Notice of Balance Due			
03-18-2001	Statutory Notice of Intent to Levy			
07-15-2002	Statutory Notice of Intent to Levy			
07-15-2002	Statutory Notice of Intent to Levy			
05-24-2004	Statutory Notice of Intent to Levy			
10-11-2004	Statutory Notice of Intent to Levy			
12-27-2004	Statutory Notice of Intent to Levy			
09-19-2005	Statutory Notice of Balance Due			
12-12-2005	Statutory Notice of Intent to Levy			
03-27-2006	Statutory Notice of Balance Due			
04-17-2006	Statutory Notice of Intent to Levy			
BALANCE	1,673,081.82			

I CERTIFY THAT THE FOREGOING TRANSCRIPT OF THE TAXPAYER NAMED ABOVE IN RESPECT TO THE TAXES SPECIFIED IS A TRUE AND COMPLETE TRANSCRIPT FOR THE PERIOD STATED, AND ALL ASSESSMENTS, ABATEMENTS, CREDITS, REFUNDS, AND ADVANCE OR UNIDENTIFIED PAYMENTS, AND THE ASSESSED BALANCE RELATING THERETO, AS DISCLOSED BY THE RECORDS OF THIS OFFICE AS OF THE ACCOUNT STATUS DATE ARE SHOWN THEREIN. I FURTHER CERTIFY THAT THE OTHER SPECIFIED MATTERS SET FORTH IN THIS TRANSCRIPT APPEAR IN THE OFFICIAL RECORDS OF THE INTERNAL REVENUE SERVICE.

SIGNATURE OF CERTIFYING OFFICER: /s/ Paul L. Czarnecki

PRINT NAME: PAUL L. CZARNECKI

TITLE: ACCOUNTING CONTROL/SERVICES OPERATION MANAGER

DELEGATION ORDER: 11

LOCATION: INTERNAL REVNUE SERVICE

ACCOUNT STATUS DATE 12/05/2006

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

CHARLES P. DANIELS, JR. and LINDA M. DANIELS, Plaintiffs, vs. THE UNITED STATES OF AMERICA, Defendant.	Civil No.: No. 06-851 T (Judge Christine O.C. Miller) AFFIDAVIT OF CHARLES P. DANIELS, JR.

Charles Daniels, of full age, deposes and says the following:

1. I am a plaintiff in the above captioned matter. I make this affidavit based on my personal knowledge.

2. I do not recall ever receiving a notice of deficiency from the Internal Revenue Service and my review of my files does not reveal my receipt of such notice.

3. I am the primary source of economic support for my family. I support my family through wage earnings.

4. During all times pertinent my wife and I have not had assets sufficient to pay an additional $2 million in taxes and interest for the 2000 tax year.

5. The attached Exhibit A is a true and correct copy of a notice my wife and I received from the Internal Revenue Service in January, 2006.

6. At the time I exercised my stock options, I was also aware of the tax consequence of selling stock that was held at least a year and a day were [sic] more favorable than the tax consequence of selling the stock held for less than a year and a day.

/s/ Charles P. Daniels, Jr.
Charles P. Daniels, Jr.

Sworn and subscribed
to before me this 23
day of April, 2007

/s/ Catherine M. Brown
Catherine M. Brown, Esq.
An Attorney at Law
of the State of New Jersey

U.S. District Court
District of New Jersey [LIVE] (Newark)
CIVIL DOCKET FOR CASE #:
2:06-cv-03415-KSH-PS

DANIELS et al v. UNITED STATES OF AMERICA
Assigned to: Judge Katherine S. Hayden
Referred to: Magistrate Judge Patty Shwartz
Cause: 26:7422 IRS: Refund Taxes

Date Filed: 07/26/2006
Date Terminated: 02/09/2007
Jury Demand: Plaintiff
Nature of Suit: 870 Taxes
Jurisdiction: U.S. Government Defendant

Plaintiff

CHARLES P. DANIELS, JR.

represented by **CATHERINE M. BROWN**
60 WASHINGTON STREET
PO BOX 9058
MORRISTOWN, NJ 07963-9058
(973) 984-9300
Fax: (973) 984-6590
Email: cmb.certcivatty@gmail.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Plaintiff

LINDA M. DANIELS

represented by **CATHERINE M. BROWN**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

V.

Defendant

UNITED STATES OF AMERICA

represented by **LAWRENCE P. BLASKOPF**
UNITED STATES DEPARTMENT
OF JUSTICE
TAX DIVISION
PO BOX 227
BEN FRANKLIN STATION
WASHINGTON, DC 20044
(202) 514-9642
Email: lawrence.p.blaskopf@usdoj.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
07/26/2006	1	COMPLAINT against UNITED STATES OF AMERICA (Filing fee $ 350 receipt number 1073408.) JURY DEMAND, filed by CHARLES P. DANIELS, JR, LINDA M. DANIELS.(lm2,) (Entered: 07/27/2006)
07/27/2006	2	Summons Issued as to UNITED STATES OF AMERICA.Days Due – 60. (mailed to counsel 7/27/06) (lm2,) Additional attachment(s) added on 7/27/2006 (lm2,). (Entered: 07/27/2006)
08/17/2006	3	SUMMONS Returned Executed by CHARLES P. DANIELS, JR, LINDA M. DANIELS. UNITED STATES OF AMERICA served on 8/17/2006, answer due 10/16/2006.

		(BROWN, CATHERINE) (Entered: 08/17/2006)
09/14/2006	4	CERTIFICATE OF SERVICE by CHARLES P. DANIELS, JR re 1 Complaint *and Linda Daniels about certified mail service* (Attachments: # 1 Exhibit A)(BROWN, CATHERINE) (Entered: 09/14/2006)
10/12/2006	5	Application and Proposed Order for Clerk's Order to extend time to answer. (Attachments: # 1 Certificate of Service)(BLASKOPF, LAWRENCE) (Entered: 10/12/2006)
10/13/2006		Application (doc #5) for an extension of time is granted. Answer Due 10/31/06 as to United States (jd,) (Entered: 10/13/2006)
10/30/2006	6	Consent ORDER that the time by which the United States is to answer complaint is extended to 11/15/06 . Signed by Judge Patty Shwartz on 10/30/06. (jd,) (Entered: 10/31/2006)
11/08/2006	7	MOTION to Dismiss for Lack of Jurisdiction by UNITED STATES OF AMERICA. Responses due by 11/27/2006 (Attachments: # 1 Declaration # 2 Brief # 3 Text of Proposed Order # 4 Certificate of Service) (BLASKOPF, LAWRENCE) (Entered: 11/08/2006)
11/08/2006		Set Deadlines as to 7 MOTION to Dismiss for Lack of Jurisdiction.

		Motion Hearing set for 12/11/2006 before Judge Katharine S. Hayden. (Please be advised that this motion shall be decided on the papers unless otherwise notified by the court) (jd,) (Entered: 11/09/2006)
11/13/2006	8	Letter from Lawrence P. Blaskopf re 7 MOTION to Dismiss for Lack of Jurisdiction. (Attachments: # 1 Brief)(BLASKOPF, LAWRENCE) (Entered: 11/13/2006)
11/27/2006	9	BRIEF in Opposition re 7 MOTION to Dismiss for Lack of Jurisdiction filed by CHARLES P. DANIELS, JR. (Attachments: # 1 Affidavit and Exhibit A)(BROWN, CATHERINE) (Entered: 11/27/2006)
12/01/2006	10	REPLY to Response to Motion re 7 MOTION to Dismiss for Lack of Jurisdiction filed by UNITED STATES OF AMERICA. (Attachments: # 1 Certificate of Service)(BLASKOPF, LAWRENCE) (Entered: 12/01/2006)
12/19/2006	11	Letter re 7 MOTION to Dismiss for Lack of Jurisdiction. (Attachments: # 1 with attachment)(BROWN, CATHERINE) (Entered: 12/19/2006)
02/09/2007	12	OPINION filed. Signed by Judge Katharine S. Hayden on 2/9/07. (rg,) (Entered: 02/09/2007)
02/09/2007	13	ORDER granting 7 Motion to Dismiss for Lack of Jurisdiction . Signed

	by Judge Katharine S. Hayden on 2/9/07. (rg,) (Entered: 02/09/2007)
02/09/2007	* * *Civil Case Terminated. (rg,) (Entered: 02/09/2007)

UNITED STATES DISTRICT COURT

District of New Jersey

CHARLES P. DANIELS, Jr. and LINDA M. DANIELS	**SUMMONS IN A CIVIL ACTION**
V.	CASE NUMBER: 06-3415(KSH)
UNITED STATES OF AMERICA	(Filed Jul. 26, 2006)

TO: (Name and address of Defendant)

UNITED STATES OF AMERICA
c/o Christopher J. Christie, Esq.
United States Attorney
970 Broad St., Room 700
Newark, N.J. 07102

YOU ARE HEREBY SUMMONED and required to serve on PLAINTIFF'S ATTORNEY (name and address)

CATHERINE M. BROWN, ESQ.
60 Washington Street, Ground Floor
P.O. Box 9058
Morristown, N.J. 07963

970-984-930060

an answer to the complaint which is served on you with this summons, within 60 days after service of this summons on you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint. Any answer that you serve on the parties to this

action must be filed with the Clerk of this Court within a reasonable period of time after service.

WILLIAM T. WALSH, CLERK	7/27/06
CLERK	DATE

LORETTA MCCALL /s/ [Illegible]
(By) DEPUTY CLERK

RETURN OF SERVICE	
Service of Summons and complaint was made by me[1]	DATE
NAME OF SERVER *(PRINT)*	TITLE
Check one box below to indicate appropriate method of service	
☐ Service personally upon the defendant. Place where served: ☐ Left copies thereof at the defendant's dwelling house or usual place of abode with a person of suitable age and discretion then residing therein. Name of person with whom the summons and complaint were left: ☐ Returned unexecuted: ☐ Other (specify):	

STATEMENT OF SERVICE FEES		
TRAVEL	SERVICES	TOTAL $0.00

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Return of Service and Statement of Service Fees is true and correct.

Executed on _____ _____
Date *Signature of Server*

_____
Address of Server

(1) As to whom may serve a summons see Rule 4 of the Federal Rules of Civil Procedure

CATHERINE M. BROWN, L.L.C.
60 Washington Street, Ground Floor
P.O. Box 9058
Morristown, New Jersey 07963-9058
(973) 984-9300
Attorney for Plaintiffs Charles P.
and Linda M. Daniels

CHARLES P. DANIELS, Jr. and LINDA M. DANIELS, Plaintiffs,	U. S. DISTRICT COURT for the DISTRICT OF NEW JERSEY
vs.	Civil Action No.:
UNITED STATES OF AMERICA, Defendant.	COMPLAINT AND DEMAND FOR JURY TRIAL

Charles P. Daniels, Jr. and Linda M. Daniels, residing at 230 Springfield Ave., Rutherford, N.J. 07070, by way of Complaint say:

JURISDICTION

The claims asserted and remedies sought herein are derived from the Internal Revenue Code, *26 U.S.C. 83, & 1001(b)* and the laws of the United States for the refund of income taxes collected from the plaintiffs and the Due Process Clause of the Constitution.

Jurisdiction of the court is derived from *28 U.S.C. 1346* and *28 U.S.C. 1331*.

PARTIES

1. Plaintiffs Charles P. Daniels, Jr., and Linda M. Daniels, husband and wife, are citizens of the United States and taxpayers who filed a joint tax return and an amended tax return for tax year 2000.

2. The defendant is the United States of America.

COUNT I
(Refund for Tax Year 2000)

3. Charles Daniels was an executive officer of Nextlink Communications, LLC, a telecommunications company, at the time of its founding in 1995. He was granted various purchase options with respect to membership units. The privately-held entity was converted into a publicly held corporation known as Nextlink, Inc. in 1997 and its membership units were converted to shares of common stock.

4. Mr. Daniels' employment was terminated in December, 1999 and, in accordance with company rules concerning the exercise of unqualified incentive stock options, exercised his remaining stock options for 235,226 shares on January 12, 2000, and became the registered owner of the shares, which the plaintiffs continue to own and which have not been redeemed or sold.

5. On January 12, 2000, the reported trading value of a share of Nextlink, Inc. stock was equal to $70.9375 dollars. During calendar year 2000 trading value of Nextlink stock experienced a precipitous devaluation and, with the eventual

insolvency of Nextlink Inc. during the calendar year 2001, the stock was revalued to a zero value.

6. The plaintiffs filed, upon authorized extension, a joint Federal income tax return (Form 1040) for calendar year 2000. They timely amended the return (Form 1040X) on or about April 13, 2004, fully paid the taxes reported due on the amended return and claimed a refund. The taxpayer identification numbers as reflected on Form 1050X are XXX-XX-5792 (Charles P. Daniels, Jr.) and XXX-XX-8315 (Linda M. Daniels).

7. The joint 1040 tax return stated an adjusted gross income of $14,599,852.00; a tax of $5,551,756.00, and a federal income tax withholding of $3,950,169.00.

8. The amended return claimed a corrected adjusted gross income of $925,813.00; a tax of $107,495.00; an [sic] a refund claim of $4,040,948.00.

9. On March 24, 2005, the Internal Revenue Service, Department of Treasury, disallowed the amended tax return.

10. The plaintiffs timely filed an appeal, which was denied by the Internal Revenue Service by notice of disallowance issued by certified mail on January 23, 2006, on the ground that the plaintiffs did not show they were entitled to the refund.

11. The Internal Revenue Service has not assessed the tax owed by the plaintiffs for the 2000 tax year and other than the notice of January 23, 2006, has not issued any other notice of deficiency.

12. The plaintiffs have fully paid the amount of taxes due and, because of their overpayment are entitled to a refund.

13. In September, 2000, Nextlink, Inc. renamed itself XO Communications.

14. The securities trading price – relied upon the Internal Revenue Service to deny the plaintiff's claim for a refund – is not the indicia of the fair market value per *26 U.S.C. 83* and *1001(b)* as applied to this case because the precipitous stock price decline which occurred during calendar year 2000 was directly caused by conditions which: (a) occurred prior to January 12, 2000, (b) were not generally known in the securities industry as of January 12, 2000, and, (c) involved fraudulent activity on the part of and the issuance of fraudulent financial reports by stock analysts who analyzed and reported upon the stock value of Nextlink, Inc./XO Communications and other telecommunications companies.

15. In all dealings with the Internal Revenue Service the plaintiffs cooperated fully and showed adequate recordkeeping and evidence in support of their position.

16. Federal income tax withholdings for tax year 2000 were erroneously collected.

17. The plaintiffs overpaid taxes for tax year 2000; they are the sole owners of the claim on which the suit is based and have made no assignment of the claim.

18. The Complaint herein is timely. It is filed within two years from the date of the denial of the refund and the plaintiffs did not file a Waiver of Statutory Notification of Claim Disallowance, Form 2297.

COUNT TWO
(Due Process Violation)

19. The Plaintiffs reallege and incorporate the foregoing as if fully set forth herein.

20. The regulations, rules and practices of the Internal Revenue Service do not allow for any measure other than the trading price of a security to calculate for tax purposes the fair market value of an employee's exercise of unqualified incentive stock options.

21. The Service's inflexible rule is an *ultra vires* interpretation *of 26 U.S.C. 83* and *1001(b)* and as applied to the circumstances herein is a deprivation of the Due Process Clause of the Fifth Amendment that has caused the plaintiffs an unwarranted deprivation of property.

WHEREFORE, plaintiffs Charles P. and Linda M. Daniels pray for judgment against the defendant, the United States of America, in the amount of $4,040,948, plus interest, attorney's fees, and costs as allowed by law, and for such other and further relief as the court may deem appropriate and just.

JURY DEMAND

The Plaintiffs, each of them, hereby demand a trial by jury on all issues in the cause.

s/ Catherine M. Brown
Catherine M. Brown, Esq.
Attorney for Plaintiffs

Dated: July 24, 2006